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FILED
FEB 14 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 832

STEFANOS KTISTAKIS,
Petitioner,

vs.

UNITED CROSS NAVIGATION CORP. and CARRAS (U.S.A.) LTD.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER,
Attorney for Petitioner,
15 Park Row,
New York 38, N. Y.

JACOB RASSNER,
ALAN C. RASSNER,
On the Petition.

Adams Press Corp., 82 Beekman Street, N. Y.—Beekman 3-1050-51 110

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Supreme Court of the United States

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No.

STEFANOS KTISTAKIS,

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vs.

UNITED CROSS NAVIGATION CORP. and CARIAS (U.S.A.) LTD.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Stafanos Ktistakis, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled action on November 18, 1963.

Opinions Below

The first opinion rendered in this case, by the United States District Court for the Southern District of New York (BONSAL, J.), is reported at 204 F. Supp. 293, on April 13, 1962.

On appeal to the United States Court of Appeals for the Second Circuit the judgment aforementioned was affirmed in part by an order entered and dated May 7, 1963 (opinion reported at 316 F. 2d 869).

The second opinion of the United States District Court, on remand, was entered on June 17, 1963 by Boxsal, D. J. (not officially reported).

The case was again appealed to the United States Court of Appeals for the Second Circuit, resulting in the judgment which petitioner seeks to have reviewed by this Court. Opinion reported at 324 F. 2d 728.

Jurisdiction

The judgment of the Court of Appeals was dated November, 1963 and was entered on November 18, 1963.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Since unseaworthiness is traditionally classified as a breach of warranty, and therefore is *ex contractu*, is it not improper and erroneous to apply a tort concept, contributory negligence, to reduce damages caused by the breach of warranty?

2. Is it not improper and erroneous to apply the tort concept of assumption of risk to reduce damages for breach of warranty of seaworthiness, which cause of action is *ex contractu*?

3. Does failure to discover an unknown unseaworthy condition aboard ship constitute negligence on the part of the officer on watch?

4. Is a ship's officer's personal injury damage award subject to reduction if injured by reason of an unknown unseaworthy condition which he failed to discover and correct?

Constitutional Provisions Involved

United States Constitution, Fifth Amendment:

"No person shall * * * be deprived of life, liberty, or property without due process of law; * * *".

Reasons for Granting the Writ

1. The questions presented raise legal issues which affect the rights of all seamen and those performing their duties, ship's officers and any other maritime personnel who may be in a supervisory capacity. These issues have not previously been decided by this Court and are of sufficient importance and scope to warrant review.

2. There is a conflict between the holding of the Court below in the present case and the holding in the case of *Dixon* v. *United States*, decided by Judge WEINFELD, 120 F. Supp. 747, and affirmed by the Court of Appeals for the Second Circuit, opinion by Circuit Judge HARLAN, 219 F. 2d 10.

3. The decision by the Court below constitutes a radical departure and unwarranted curtailment of remedial rights, constituting a denial of equal protection before the law, as heretofore ships' officers were not charged with contributory negligence based on an unseaworthy condition proximately causing injury, notwithstanding the duty of said officer to inspect and correct said condition, as exemplified by the conflict in the instant case with the holdings in the cases cited under Point II, *infra*.

4. The Court below has decided an important question of federal law which has not been, but should be, settled by this Court.

Statement

Jurisdiction below was based on the Jones Act, 46 U.S.C.A. §688, and the General Maritime Law, based on unseaworthiness.

The District Court, which tried this case without a jury, found that the petitioner was entitled to recover the sum of $80,000 in damages, but reduced the award by 50% for petitioner's contributory negligence for not discovering and correcting an unknown unseaworthy condition.

The appeals to the Circuit Court of Appeals were from that part of the judgment entered in the United States District Court for the Southern District of New York which constituted a reduction in the amount of damages to which the petitioner was adjudged entitled.

The pertinent facts may be briefly summarized as follows:

Petitioner was the second mate on board the S.S. GENIE, a vessel owned and operated by the respondent, United Cross Navigation Corp. On November 14 and 15, 1957, the S.S. GENIE was discharging oil at Port Socony, Staten Island, New York.

The petitioner, as second mate, stood his watch from midnight to 4:00 a.m., on November 15th and was the officer in charge at that time. At about 2:30 a.m., he was walking aft and as he passed under the discharge lines, which were approximately 4 to 5 feet above the deck, he stepped on an accumulation of oil mixed with sawdust and fell, landing on his lower back and sustaining the permanent and totally disabling injuries claimed.

Argument

The Trial Court found that the mixture of sawdust and oil on the deck was created before the petitioner came on watch at midnight.

The Trial Court found such condition constituted unseaworthiness which was the proximate causation of petitioner's injury.

Implicit in this finding is the fact that the petitioner had nothing to do with causing or contributing to the creation of the unseaworthy condition which caused petitioner's fall.

The Trial Court made no finding that petitioner knew of the existence of the oil spill.

The found physical facts were the sole and proximate cause of petitioner's fall and would have caused his fall during a tour of inspection.

Assuming, *arguendo*, he was on a tour of inspection, he would have been caused to fall by the unseaworthy condition as he did when walking in the area, as his purpose in being there did not alter the physical facts of unseaworthiness; nor would it alter his method of crossing under the discharge lines or alter the proximate cause of the accident.

POINT I

Tort defenses are not available in ex contractu causes of action.

Traditionally, the warranty of seaworthiness has always been treated as a warranty running from the vessel and/or the owner to the seamen hired to man her.

The essence of the contract of hire between the owner and the crew is that the owner warrants, on his part, that the vessel is seaworthy.

For a breach of the owner's warranty, the owner responds in damages.

Thus, traditionally, in essence and substance, the cause of action for breach of the warranty of seaworthiness is *ex contractu*.

Assumption of risk and contributory negligence are tort defenses which are not available as total or partial defenses to a cause of action action *ex contractu*.[1]

A close analogy supporting this contention is found in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 133-135; 76 S. Ct. 232, 237, 238, where it was held that contributory negligence was no defense to a cause of action for breach of warranty of good workmanship and the contract cause may not be changed to a tort cause because recovery may depend on a standard of performance.[1]

This Court's holding in *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 730-731, 63 S. Ct. 930, 933-4 similarly presents a close analogy supporting petitioner's contention herein.

In *Aguilar*, this Court said, regarding maintenance and cure liability:

> "In the United States this obligation has been recognized consistently as an implied provision in contracts of marine employment. * * * Conceptions of contributory negligence, the fellow servant doctrine, and assumption of risk have no place in the liability or defense against it."

The warranty of seaworthiness, like the obligation to provide maintenance and cure, is an implied provision of the maritime contract of employment between ship-owner and crew.

As further support for the contention that the warranty of seaworthiness is a contractual obligation, see this Court's remarks in *The Arizona* v. *Anelich*, 298 U. S. 110,

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[1] See *Horton* v. *Moore-McCormack Lines, Inc.*, ____ F. 2d ____ (decided Jan. 7, 1964, 2nd Cir.), where the Court referred to the area of "contractual indemnity" and held that one who breaches his agreement cannot argue the adversary is liable because of negligence.

121; 56 S. Ct. 707, 710-711 (including fn. 2). In *The Arizona*, this Court said:

> "In declaring in The Osceola, without qualification as to the assumption of risk, that the owner and vessel were liable to indemnify seamen for injuries caused by unseaworthiness of the vessel, * * *",

thus indicating, by use of the term "indemnify", that a contractual relationship was involved and not one merely predicated on tort alone.

This theory of contract between shipowner and crew is further carried out in footnote 2 on page 121 of 298 U. S. and page 710 of 56 S. Ct. wherein it is said:

> "The seaman's right of indemnity for injuries caused by defective appliances or unseaworthiness seems to have been a development from his privilege to abandon a vessel improperly fitted out. The privilege was recognized in Dixon v. The Cyrus, Fed. Cas. No. 3,930, 2 Pet. Adm. 407 (D. C. Pa., 1789), where it was held that the law will imply an engagement to the mariners that 'the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy.' This case was relied on in several early cases recognizing the seaman's right to consequential damages for injuries resulting from faulty equipment. Halverson v. Nisen, Fed. Cas. No. 5,970, 3 Sawy. 562; The Noddleburn (D. C.) 28 F. 855, 856; The Lizzie Frank (D. C.) 31 F. 477; and see The Wenonah, Fed. Cas. No 17,412. 1 Hask. 606. The rule that unseaworthiness releases the seaman from his contract is of uncertain origin, but it is closely related to the master's obligation to owner and shipper that the vessel be well equipped and ballasted. See Marine Ordinances of Louis XIV, Book II, art. VIII, Moloy, De

Jure Maritimo et Navali (7th Ed. 1722) p. 223. The seaman's right of indemnity was sustained in The City of Alexandria (D. C.) 17 F. 390; The Edith Godden (D. C.) 23 F. 43; Olson v. Flavel (D. C.) 34 F. 477; The A. Heaton (C. C.) 43 F. 592; The Frank and Willie (D. C.) 45 F. 494; The Julia Fowler (D. C.) 49 F. 277. A seaman was denied recovery for injuries in Couch v. Steele (1853) 3 El. & Bl. 402, on the ground that the owner owed to seamen no duty to make the vessel seaworthy. This case was disapproved in The Noddleburn, supra, 28 F. 855, 857, which allowed recovery for *an injury due to defective rigging. The Merchant Shipping Act of 1876, 39-40 Vict. ch. 80, § 5, provided that there should be imported into every contract of service between the owner of the vessel and the seamen on board an implied obligation "that the owner of the ship and the master, and every agent charged with the loading of the ship or the preparing thereof for sea or the sending thereof to sea shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences and to keep her in a seaworthy condition for the voyage during the same." See Hedley v. Pinkney & Sons S.S. Co. [1894] A. C. 222, strictly construing this statute."* (Emphasis supplied.)

Clearly, the early maritime law (early insofar as this country is concerned) treated the warranty of seaworthiness as an implied contractual obligation between the shipowner and the mariners.

Nothing that has happened since in the field of maritime law has changed this basic and early approach.

It is respectfully submitted, therefore, that the Court below erred in permitting the defenses of assumption of risk and/or contributory negligence to reduce the award to petitioner.

POINT II

The judgment below violates the Fifth Amendment to the Federal Constitution, as it deprives petitioner of due process and denies him equal protection of the law.

Petitioner is entitled to equal protection before the Court as was given to other ships' officers under similar circumstances.

The Fifth Amendment to the Federal Constitution prohibits the taking of property without due process.[1]

Due process requirements may be violated by Courts in judicial proceedings, as well as by other governmental agencies.

Chicopee Mfg. Corp. v. *Kendall Co.*, 288 F. 2d 719.

Due process under the Fifth Amendment includes protection against denial of the equal protection of the law as guaranteed by the Fourteenth Amendment.

Radio Position Finding Corp. v. Bendix Corp., 205 F. S. 850, aff'd 371 U. S. 577.

Applying the law with an unequal hand is denial of the equal protection of the law.

Yick Wo v. *Hopkins*, 118 U. S. 356.

Then Judge HARLAN, before his appointment as a Justice of the United States Supreme Court and while sitting as an Appellate Judge in the Court of Appeals for the Second

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[1] U. S. Constitution, Fifth Amendment:

"No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *"

Circuit, so clearly set forth the controlling law as to constitute the decision by the Court below a radical departure from well established and uniform law. This Court has relied on Justice HARLAN's learned exposition. See: *Dixon v. United States*, 219 F. 2d 10.

The United States Supreme Court in the case of *Mitchell v. Trawler Racer, Inc.*, 80 S. Ct. 926, 362 U. S. 539 (1960), under footnote 7 (page 930), stated:

> "* * * * See also the illuminating discussion in the opinion of then Circuit Judge Harlan in Dixon v. United *States*, 2 Cir., 219 F. 2d 10, 12-15."

In *Dixon v. United States, supra*, Dixon was injured when a rung gave way on a ladder which he used before making an inspection as to its safety. Dixon had actual knowledge of the fact that the ladder had been damaged and had undergone some repairs, and, in addition thereto, he had a direct order from his captain to inspect the very ladder in question. In *Dixon, supra*, the Court stated at page 16:

> "The lower Court held assumption of risk to be no defense because it found that Dixon had no reason to believe that the upper rungs of the ladder were in a dangerous condition, and also because as a matter of law the defense was invalid. We think both grounds were correct.
>
> Hence even though it was part of Dixon's duty to check the ladder and he had proceeded to the job with actual knowledge of the dangerous condition of the upper rungs, the shipowner could not have said that Dixon thereby assumed the risks involved."

In the case of *Becker v. Waterman S.S. Corporation*, 179 F. 2d 713, the officer was not held guilty of contributory

negligence when he slipped and fell as a result of a slippery condition as to which he had full actual knowledge, as he was in charge of the very operation in question.

In *Stokes* v. *United States*, 144 F. 2d 82, the Court of Appeals for the Second Circuit reversed the Trial Court which had found the chief engineer guilty of contributory negligence in failing to discover a defect in the flywheel, parts of which struck Stokes, holding that the failure in his duty to discover and correct a defect in the machinery did not constitute proximate causation of negligence.

In *Hildebrand* v. *United States*, 134 F. Supp. 514, aff'd 226 F. 2d 215, libellant, as third mate of the S.S. CASIMIR PULASKI, was not charged with contributory negligence in failing to repair a known defective ladder which broke while libellant was descending.

To charge a ship's officer with contributory negligence on the basis that he should have discovered the unseaworthy condition or had constructive notice of it, is tantamount to a charge that he assumed the risk of the dangerous condition, which defense has been specifically deleted from maritime law. *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 59 S. Ct. 262.

POINT III

A ship's officer does not assume the risk of injury due to unseaworthiness, nor is it negligence on the part of a ship's officer to fail to correct an unseaworthy condition unknown to him.

In the case of *Phillips Petroleum Co.* v. *Miller*, 84 F. 2d 148, at page 153, the Court stated:

> "Nor, indeed, will knowledge be imputed as a matter of law, to one who fails to look for danger, which, under

the prevailing circumstances and conditions, he had no reason to apprehend or anticipate. The Ansonia v. Sullivan (C.C.A.), 239 F. 296; Borger v. Kane (D.C.), 8 F. (2d) 362, affirmed Kane v. Borgio (C.C.A.), 12 F. (2d) 1016."

See also:

Stark v. *American Dredging Co.*, 66 F. Supp. 296, 300;

Southwestern Gas & Electric Co. v. *Lain*, 139 F. 2d 142, 144.

Petitioner cannot be charged with the duty to anticipate the negligence of others who may have created the dangerous condition.

See: *New York Lubricating Oil Co.* v. *Pusey*, 211 Fed. 622, 626, where the court stated at pages 626 and 627:

"But it is necessary in this connection not to overlook the general rule that every person has a right to presume that every other person will perform his duty, and that, in the absence of reasonable ground to think otherwise, it is not negligence for one to assume that he is not exposed to danger which can come to him only from violation of the duty which the other vowed to him. Failure to anticipate the defendant's negligence does not amount to contributory negligence. (Citing cases.)"

The United States Court of Appeals for the Sixth Circuit in the case of *Northwest Airlines* v. *Glenn L. Martin Company*, 224 F. 2d 120 at page 127, discussed the question of whether a plaintiff becomes contributorily negligent by failing to anticipate the negligence of the defendant as follows:

"One need not anticipate the negligence of another until he becomes aware of such negligence. Baldridge v. Wright Gas Co., Inc., 1951, 154 Ohio St. 452, 96 N. E. 2d 300 (Syl. 1). It is not contributory negligence to fail to look out for danger when there is no reason to apprehend any. Standard Oil Co. v. Bruleson, 5 Cir. 1941, 117 F. 2d 412, 414; Phillips Petroleum Co. v. Hooper, 5 Cir., 1948, 164 F. 2d 743; S.S. Kresge v. Holland, 6 Cir., 1946, 158 F. 2d 495, 498."

CONCLUSION

The legal significance of unseaworthiness constituting negligence is so beclouded as to result in some Courts granting recovery to ships' officers and other Courts denying recovery on identical facts.

In order to assure equal protection under the law, it is quite apparent that the conflict of opinion by the lower Courts requires resolution of the conflict by the Supreme Court of the United States.

It seems self apparent that the questions merit review, in light of the fact that some ships' officers have been absolved from the charge of contributory negligence when injured as a result of unseaworthy conditions of which they had actual knowledge, and in some instances, as in *Dixon, supra*, an actual order to correct the condition was involved, whereas in the case at bar, the petitioner, who knew nothing about the unseaworthy condition, was charged with contributory negligence and mitigation of damages to the extent of a 50% reduction, amounting to $40,000.

A ship's officer, particularly one who is crippled and totally disabled for life, should not be subjected to the fortuitous circumstance of being charged with contributory negligence where other officers, under similar circum-

stances, in the same and in other Courts, are not so charged.

The questions presented raise legal issues which involve important principles of maritime law that have not been settled by this Court or the Circuit Courts and which merit consideration by this Honorable Court to settle the law on the universally important questions of the availability of the tort defenses of assumption of risk and contributory negligence to an *ex contractu* cause of action, breach of warranty of seaworthiness.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

JACOB RASSNER and
ALAN C. RASSNER,
On the Petition.

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 154—September Term, 1963.

(Argued November 7, 1963 Decided November 18, 1963.)

Docket No. 28410

STEFANOS KTISTAKIS,

Plaintiff-Appellant,

v.

UNITED CROSS NAVIGATION CORP. and CARRAS (U. S. A.) LTD.,

Defendants-Appellees.

Before:

WATERMAN, MOORE, and SMITH,
Circuit Judges.

Appeal by plaintiff below from judgment in his favor for $40,000, United States District Court for the Southern District of New York, Bonsal, J., after remand from Court of Appeals, 316 F. 2d 869. Affirmed.

Appendix A

JAMES CORINES (Jacob Rassner, of counsel) (Jacob Rassner, Alan C. Rassner, on the brief), New York City, for plaintiff-appellant.

ZOCK, PETRIE, SHENKMAN & REID (Edwin K. Reid, of counsel), New York City, for defendants-appellees.

PER CURIAM:

After trial of the action, which was brought within the district court's admiralty and maritime jurisdiction, the judge below, sitting without jury, awarded plaintiff damages of $40,000. He found plaintiff to have been so contributorily negligent that the $40,000 award represented but half of the recovery plaintiff would have been entitled to receive if he had not been negligent in any degree. This opinion is reported at 204 F. Supp. 293 (S. D. N. Y. 1962). Upon appeal, 316 F. 2d 869 (2 Cir. 1963), it was our view that the district judge may have given undue weight in his appraisement of plaintiff's negligence to the circumstance that plaintiff was the vessel's second mate, and, when injured, was the officer in charge of the watch, and hence had a duty to keep the deck clean from oil spill and sawdust. Therefore, we remanded the case to the district judge with instructions to re-examine the plaintiff's conduct "by the traditional negligence standard of whether he exercise the care which a reasonably prudent man would have exercised under the circumstances."

After remand plaintiff moved for summary judgment and a redetermination of the damages on the trial record. Obedient to our instructions, the judge reviewed the record and applied the standard we instructed him to apply. In a memorandum opinion he reaffirmed his previous estimate

of the extent to which plaintiff's own negligence had contributed to the injury, and he reaffirmed his former award of damages. Plaintiff appealed. We affirm. Oil had been dripping for several hours from the coupling where the shore discharge lines connected with the ship's manifold discharge lines and spill tubs had been placed under the leaking coupling to catch the drip. The entire area was well lighted. From midnight until 2:30 A.M. plaintiff had been responsible for the supervision of the work being done in this area, including the emptying of the spill tubs from time to time. The slippery condition caused by the oil that had dripped onto the deck from the coupling or the tubs should have been apparent to a reasonably prudent man in the plaintiff's position.

Affirmed.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, held at the United States Courthouse in the City of New York, on the eighteenth day of November one thousand nine hundred and sixty-three.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
Circuit Judges.

STEFANOS KTISTAKIS,
Plaintiff-Appellant,

v.

UNITED CROSS NAVIGATION CORP., and CARRAS (U.S.A.) LTD.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.